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## DEATH BY A THOUSAND CUTS: WHY MARKET MECHANISMS WON'T SOLVE THE CULTURE WARS

CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE  
SPACE BETWEEN PERSON AND STATE. By Robert K. Vischer.  
Cambridge University Press. 2010.

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Lilly Stockton owner of Just Cookies is currently under investigation to determine whether her cookie stand violated an Indianapolis anti-discrimination ordinance for declining to fill a special rainbow-colored cupcakes order for a student group's "National Coming Out Day" celebration.<sup>1</sup> If found guilty, the business could be fined under the ordinance.<sup>2</sup> Mrs. Stockton suggested to a news reporter that she had no idea what the cupcakes were for, saying, "Look around, we don't have cupcakes"<sup>3</sup>—which is presumably why her stand is called "Just Cookies." Furthermore, Mrs. Stockton claimed the refusal was not based on any opposition to the Coming Out Day celebration because "[the buyer] didn't tell [her] what it was for" and an order for rainbow cookies was not possible because she did not "have enough colors to do that."<sup>4</sup> Her husband, however, told reporters, "I explained that we're a family-run business, we have two young, impressionable daughters and we thought maybe it was best not to do that."<sup>5</sup>

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<sup>1</sup> Scott Olson, *Local Ordinance Could Be Key in City Market Discrimination Flap*, INDIANAPOLIS BUS. J. (Sept. 30, 2010), [www.ibj.com/article/print?articleId=22578](http://www.ibj.com/article/print?articleId=22578).

<sup>2</sup> *See id.*

<sup>3</sup> Ray Cortopassi, *Local Bakery Refuses To Make Rainbow Cupcakes for Gay Customer*, FOX 59 NEWS (Sept. 23, 2010), [www.fox59.com/news/wxin-bakery-wont-make-rainbow-cupcakes-092310,0,6300849.story](http://www.fox59.com/news/wxin-bakery-wont-make-rainbow-cupcakes-092310,0,6300849.story) (internal quotation marks omitted).

<sup>4</sup> *Id.* (internal quotation marks omitted).

<sup>5</sup> *Id.* (internal quotation marks omitted).

The Mayor's office has suggested that Just Cookies may lose its lease in the city-run market to "make clear that everyone is welcome in the Market. . . . The city owns the Market and we don't want there to be a feeling that, because you have a certain belief, you're not welcome."<sup>6</sup> In further explaining why the Mayor was considering evicting the cookie company from its stand after more than twenty years in business, his spokesman explained, "[t]he mayor was certainly dismayed and wants to make it clear that a person's values, morality and personal beliefs are absolutely not relevant to making a purchase at the City Market."<sup>7</sup> In support of the Stocktons, Micah Clark, the president of the American Family Association of Indiana, told reporters that his organization was willing to provide legal assistance to the owners of the cookie stand.<sup>8</sup> He said:

It's one thing if someone walks into a store and buys a cookie off the shelf, but (the Stocktons) were being asked to become part of the (National Coming Out Day) celebration. To make rainbow cookies for a special event with which the company has a disagreement—I think that goes beyond the pale of what we should expect companies to do.<sup>9</sup>

Newspapers reported that the student group filled its order at another local bakery, The Flying Cupcake,<sup>10</sup> and that local gay groups were planning a boycott of Just Cookies.<sup>11</sup>

This controversy could be a case-study for the arguments presented in Robert K. Vischer's new book *Conscience and the Common Good: Reclaiming the Space Between Person and State*.<sup>12</sup> In the book, he suggests that the mayor of Indianapolis has got it exactly wrong, that, in fact, a person's "values, morality and personal beliefs" are and should be central to their activity in the marketplace.<sup>13</sup> Vischer addresses several questions similar to

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<sup>6</sup> Olson, *supra* note 1 (internal quotation marks omitted).

<sup>7</sup> Bill McCleery, *City Market Vendor Could Lose Lease for Turning Away Gays*, INDIANAPOLIS STAR (Sept. 30, 2010), <http://www.indy.com/posts/city-market-vendor-could-lose-lease-for-turning-away-gays> (internal quotation marks omitted). In this article, Mrs. Stockton is also quoted as saying that her cookie company does not take special orders because they are too busy selling cookies at their stand. *See id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See* Olson, *supra* note 1.

<sup>11</sup> *See* McCleery, *supra* note 7.

<sup>12</sup> ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010).

<sup>13</sup> *See* McCleery, *supra* note 7.

those raised by the cupcake dispute. When should the state intervene in disputes between citizens whose opposing moral positions clash in the market place? Should a pharmacist have to sell the morning-after pill, even if she believes doing so would violate her duty to do no harm and implicate her in a serious moral evil?<sup>14</sup> Can a wedding photographer licitly refuse services to a lesbian couple to avoid the appearance of moral approval of same-sex marriage?<sup>15</sup> Vischer argues that such disputes should be left largely to the “moral marketplace” to sort out and that the state should mainly abstain from taking sides.<sup>16</sup> His central thesis is that the common good and respect for conscience will flourish where the state has minimal involvement in “culture war” issues.<sup>17</sup> The workings of the market, including private organizing in support of, or in opposition to, various moral causes, will provide “breathing space” for people to create communities around shared values. The gay-friendly crowd will head to The Flying Cupcake and the traditional morality crowd will head to Just Cookies, and both sides will further flourish in living out their shared ideals in “their own respective moral communities.”<sup>18</sup>

Similar market mechanisms will provide photographers for gay wedding ceremonies and also permit those opposed to this practice to continue to run their businesses for straight couples only; “pro-morning-after pill” pharmacies will compete for moral adherents with those opposed to the drug. The state will practice restraint in refusing to take sides between the two contending parties, minimizing its use of coercive power, and the market will eventually create diverse and robust moral communities, co-existing and seeking to persuade others to join with them in common cause.

But, what if Just Cookies is the only bakery in town? More pointedly, what if Mom and Pop’s drugstore, with a policy against the morning-after pill, is the only pharmacy in the community? Or, say there are four drugstores and all of them are run by those with objections to the morning-after pill? And what if those seeking the drug have to drive two hours to get to the

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<sup>14</sup> See VISCHER, *supra* note 12, at 170.

<sup>15</sup> See *id.* at 2.

<sup>16</sup> See *id.* at 4–5.

<sup>17</sup> See *id.* at 6–8.

<sup>18</sup> See *id.* at 5.

non-objecting pharmacy? At some point, the difficulty or inconvenience of getting access to the morning-after pill will be so great that the drug is effectively “unavailable” to those who want it. Now the state has an appropriate “market correcting” role to play in this dispute, according to Vischer.<sup>19</sup>

In sum, he argues that the state should pursue a policy that aims at securing the minimum damage to freedom of conscience that is compatible with the maximum achievement of individual liberty to do, to buy, and to consume whatever is legally permitted. This policy gives priority to the latter by its willingness to violate freedom of conscience if that is the only way to secure individual liberty to do, buy, and consume. Vischer’s arbitrary prioritization of the consumer’s liberty over the provider’s conscience is never directly justified, but he argues that his approach is more fully compatible with both the common good and a proper respect for conscience.

In practical terms, the state should have some kind of mechanism for intervention upon a finding that there has been such a “market failure,” by which he seems to mean that someone has been denied access to a desired, but morally controversial, good or service.<sup>20</sup> Under Vischer’s proposal, it is then proper for the state to coerce Mom and Pop—and perhaps others in agreement with them—into selling the morning-after pill, rainbow cupcakes, or photography services, either through a licensing procedure or through the imposition of legal liability.

Vischer argues that this more limited market correcting role represents the proper compromise between the contending “culture war” positions.<sup>21</sup> He asserts that “winner take all” uses of the coercive power of the state, such as uniform mandates to businesses or uniform conscience protections of businesses, are often unnecessary intrusions that fail to respect the proper function of mediating social institutions and the need to create marketplace communities with shared moral convictions.<sup>22</sup> At the same time, a complete refusal of the state to intervene on behalf of those who cannot access morally disputed goods and

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<sup>19</sup> See *id.* at 172–73.

<sup>20</sup> See, e.g., *id.* at 174–75 (describing “market failures” with respect to pharmaceuticals).

<sup>21</sup> See, e.g., *id.* at 176.

<sup>22</sup> See, e.g., *id.* (“[T]he normative claims pursued by the government should not impose particular substantive outcomes on the moral debate . . . but should be geared toward facilitating participation within the market.”).

services would mean that many with opposing moral views would not have the freedom to fully live out their shared moral convictions in their own social settings.

However, Vischer's policy solution to this dilemma, the state as a corrector of "market failures," seems to risk a slow-motion descent into a widespread use of state coercion that he says will undermine the common good and make it impossible for moral communities to live out their share convictions in the marketplace. I will focus only on this aspect of Vischer's work—his argument that the proper use of the coercive power of the state should usually be limited to guaranteeing access to certain goods and services and that this limited role is both necessary and sufficient for the proper protection of the common good and the freedom of conscience.<sup>23</sup>

I should make it clear that this sub-topic about the proper use of state coercive force is only one aspect of the whole of the book, which focuses broadly on drawing out the implications of what he calls the "relational dimension of conscience."<sup>24</sup> Nevertheless, his policy proposal is an important practical conclusion that flows from the book's broader discussion, and it is at the heart of his answer to how to properly "reclaim the space" between person and state in relation to "culture war" issues, in which each side seeks to marshal the coercive force of the state to defeat its opponents. I will not address the underlying theory regarding the nature of the common good, nor the nature of conscience, except as they are invoked to justify this limited state "market access" guarantor role.

To explain my concerns with his conclusions, I will first set out my understanding of Vischer's central policy proposal. He suggests a system whereby the state is empowered to recognize and correct certain kinds of "market failures" related to the moral views of different segments of society.<sup>25</sup> Vischer argues that this role is not properly viewed as "taking sides" but rather is simply ensuring that both sides of contested issues are

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<sup>23</sup> He believes that the costs of such restraint by the state are too high in the areas of employment and housing discrimination and that a uniform anti-discrimination rule is necessary in these contexts. *See id.* at 27–28.

<sup>24</sup> *See id.* at 8–11.

<sup>25</sup> *See, e.g., id.* at 172 ("The state's primary role will be to address market failure. As do traditional economic markets, markets composed of commercial firms trafficking not just in goods and services, but also in moral claims, will also fail.").

properly accommodated in civil society.<sup>26</sup> In an illustrative case, concerning how the state should handle disputes over access to certain pharmaceuticals, Vischer says:

[T]he normative claims pursued by the government should not impose particular substantive outcomes on the moral debate—the nonnegotiable sanctity of the pharmacist’s conscience or the nonnegotiable sanctity of consumer choice—but should be geared toward facilitating participation within the market. The state is a facilitator, not an arbiter.

... The normative claims to be pursued by the state as a market actor thus boil down to questions of access. Whether to remedy market failures or to overcome deliberately exclusionary practices by key economic gatekeepers, the state’s objective is not to impose a certain vision of the good, but to promote the public conversation(s) regarding the good.<sup>27</sup>

Of course, this position does in fact “impose a certain vision of the good” and is not as morally neutral as suggested. This proposed solution to the “culture war” does, however, highlight a common move when a moral debate has reached a stalemate: the search for neutral, quasi-procedural solutions to seemingly intractable substantive disputes. Rather than deciding finally on the normative answer to the question “which side is correct about how we should live together,” we search for a mechanism that will allow us to sidestep the thornier question to achieve a kind of *détente*. The question I want to address is, would this mechanism really lead to a *détente* in which both sides of the “culture war” can flourish side by side, as Vischer suggests. Unfortunately, I believe his proposal would create several serious risks to the rights of businesses and individuals to integrate their professional lives with their conscientious beliefs.

Turning to these practical aspects of his policy proposal, I first have to ask what is meant by the term “market failure” in this context. It is not clear why one would conclude that an inability of some people to access a desired good or service amounts to a “market failure” requiring state intervention simply because the unavailability is premised on a moral judgment of the provider.

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<sup>26</sup> See, e.g., *id.* at 176 (“The state is a facilitator, not an arbiter.”).

<sup>27</sup> *Id.* at 176.

Many people, especially those in rural areas, have difficulty accessing many kinds of goods and services for all kinds of reasons, and no one argues that the state should intervene to correct this problem. There must be something that sets apart ordinary lack of access from this extraordinary lack of access warranting the use of state coercive power, but the distinction is not made explicit in Vischer's book. For instance, suppose the only hardware store in my community refuses to sell vacuum cleaners and there is no other source of them for miles and miles. Perhaps the store owner does not want to waste space on a product for which there is insufficient demand. Perhaps this lack of demand is partly due to the fact that people in my community do not like vacuum cleaners because they use too much electricity or promote laziness or they want to support local broom makers or because vacuum cleaners are not made in America. All of these reasons reflect certain moral convictions that I may not share, but if the owner of the hardware store and the majority of my town are morally opposed to vacuums, then the unavailability of the machine is a result of a properly working market and not a failure at all. It might be very important to me to have a vacuum cleaner for many reasons. I may have allergies or asthma that will be exacerbated by my inability to vacuum my house, but I do not believe that Vischer would argue that the state should properly force my hardware store to offer to sell me one, regardless of the reasons for failing to offer them.

The ambiguity about how a triggering "market failure" is to be identified makes it difficult to properly assess Vischer's proposal. What is it that distinguishes the kinds of "market failure" that warrant state intervention? Vischer sometimes suggests that the state will only ensure access to "essential" goods or services, but nowhere does he define that term.<sup>28</sup> Is a vacuum cleaner an essential good? What about access to abortion? Perhaps a "market failure" is a trigger because of the prevalence of the debate, the identification with a broader "culture war," or the wide-spread or serious inconvenience that those denied access will experience—but each of these is part and parcel of the underlying moral dispute. If it really is the case, for instance that abortion is destructive and harmful to important human goods, then none of these other factors—wide-spread

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<sup>28</sup> See, e.g., *id.* at 306.



debate, attention, inconvenience—will change an abortion into something “essential.” Indeed, from this perspective, it may rather be that the true “market failure” lies in providing access to such destructive services. Therefore, right at the start of his policy proposal, Vischer requires the state to abandon its supposed substantive neutrality in the “culture war” and to make state coercive power operative on only one side of only some disputable moral questions. Those with moral objections to other kinds of goods and services will not likely face the stark consequences of such a judgment.

A similar “market failure” analysis is required with regard to certain deliberate exclusionary practices, which is the term Vischer uses to discuss the discriminatory denial of goods or services to a distinct class of people. Again, only certain kinds of such discrimination will presumably count as triggering events. Had a town’s only available providers of cupcakes or photography services declined to serve the local Tea Party movement, Earth Day celebration, feminist rally, or atheist convention, would any or all of these constitute a triggering market failure? Under Vischer’s proposal, each of these groups has an incentive to seek to be brought into a system that gives them the potential to a state-enforced right of access to goods and services. What is the morally neutral principle determining which groups are worthy of this use of state power?

Vischer does say that not every kind of exclusionary practice or objectionable product or service will be made the subject of the state’s “market facilitating” function, but his list is pretty expansive. In addition to wedding photographers,<sup>29</sup> we have arguable rights to government coercion to facilitate our access to: taxi services at airports,<sup>30</sup> adoption agencies,<sup>31</sup>

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<sup>29</sup> See *id.* (“[I]f there are ten wedding photographers in Albuquerque willing to shoot a same-sex commitment ceremony, the justification for state action looks much different than if the [objectors] are the only photographers in town.”).

<sup>30</sup> See *id.* at 307 (“The limited marketplace encountered by a given passenger, combined with the significant percentage of drivers in Minneapolis who object to transporting alcohol, may warrant the airport commission’s refusal to accommodate drivers’ consciences . . .”).

<sup>31</sup> See *id.* at 150 (“Provided that birth parents were informed of the organization’s discriminatory policy, and that they could have chosen other agencies that did not exclude same-sex couples, the state should have allowed the marketplace to function.”).

infertility treatments,<sup>32</sup> anti-depressants,<sup>33</sup> voluntary associations,<sup>34</sup> particular educational programs in schools,<sup>35</sup> legal services,<sup>36</sup> and more. Under Vischer's approach, the state in each of these cases should conduct a factual inquiry into whether a "consumer" has been deprived of some good or service based on a provider's moral decisions and, if so, whether it should take action.<sup>37</sup>

Vischer argues, however, that under his proposed system, many with moral objections to providing various goods and services will remain free of state coercion and will be permitted to continue to conduct their businesses in conformity with their moral views. However, I find this assertion to be doubtful given the many uncertainties and difficulties that businesses will face under Vischer's proposed system.

Take, for instance, Vischer's example of a wedding photographer who objects on moral grounds to accepting a job to photograph a same-sex commitment ceremony.<sup>38</sup> In the actual case, the photographer was sanctioned under the state's anti-discrimination statute for refusing the job based on objections to homosexuality.<sup>39</sup> But under Vischer's "market access" approach, so long as the homosexual couple can access the goods or services

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<sup>32</sup> See *id.* at 306–07 ("Consider the . . . lawsuit filed by Guadalupe Benitez against a fertility clinic. . . . Ideally, the resolution of this conflict would not hinge on elevating freedom or equality over the other, but on whether Benitez could obtain those services elsewhere without incurring substantial hardship.").

<sup>33</sup> See *id.* at 161 (describing pharmacists' battle to have courts hold that they should not be compelled to dispense certain medications including birth control pills and antidepressants).

<sup>34</sup> See *id.* at 133–34 ("If the Jaycees functioned as a male-only business network with significant market influence, the state would have a legitimate interest in regulating the organization to promote women's access to economic opportunity.").

<sup>35</sup> See *id.* at 219 ("The marketplace analogy is limited here. . . . Nevertheless, the state's focus remains the same [with respect to education] as in its regulation of pharmacies or attorneys: ensuring access to the goods in question. When there is only one pharmacy serving an area, the state may appropriately require a full range of pharmaceuticals to be offered as a condition of licensing. When students lack any choice in the educational marketplace, the state must ensure that they can receive a full education at the school to which they are assigned.").

<sup>36</sup> *Id.* at 301 ("[A]s long as a viable market for legal services exists, the lawyer's adherence to her own conscience-informed professional boundaries does not threaten the rule of law.").

<sup>37</sup> See, e.g., *id.* at 172–73 ("If moral discourse regarding controversial pharmaceuticals is going to take place, we must discern between market-driven inconvenience and market-driven lack of access.").

<sup>38</sup> See *id.* at 2–5.

<sup>39</sup> See *id.* at 2.

elsewhere in the community, the wedding photographer will face no legal liability.<sup>40</sup> At the same time, the homosexual community is free to organize boycotts or other private protests against such businesses. The wedding photographer is also free to seek to build up a client base of like-minded customers who wish to support the construction of a market for others who share the photographer's moral disapproval of homosexual unions.

Vischer acknowledges that there will be administrative difficulties in applying his "market access" rule but sets forth some suggestions about how such a mechanism could work. For instance, some market actors are already licensed by the local government, and a business that wishes to refuse certain goods or services as a whole or with respect to a certain class could be required as a condition of licensing to demonstrate that there are alternative sources available in the community that have no such access restrictions.<sup>41</sup> For non-licensed businesses, the state could provide a "market-access" defense to a discrimination lawsuit, providing that no liability will be found so long as the business can demonstrate that there are other sources in the community where the goods or services are available without the moral restrictions.<sup>42</sup>

In practice, however, this system is still stacked against the objecting providers. Put yourself in the shoes of the wedding photographer who will face legal liability if he refuses a job on moral grounds and the customer cannot access the services elsewhere. The first problem for the photographer is uncertainty. As Vischer acknowledges, "availability" and "in the community" are relative terms that, given the deep commitment on both sides of disputed moral claims, will be hard fought over.<sup>43</sup> But, even a clear definition of the geographical limits of a community will not resolve the uncertainty. Suppose there are four possible services within the county, two of which are already booked for the date sought and one of which offers poor quality work. Under these circumstances, would the "market access"

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<sup>40</sup> See *id.* at 5 ("Assuming that other wedding photographers are willing and able to shoot a same-sex commitment ceremony, the state should leave the [photographers who objected] to answer to the consumer, not the state, and allow consumers to utilize market power to contest (or embrace) the moral norms of their choosing.").

<sup>41</sup> See *id.* at 306.

<sup>42</sup> *Id.* (internal quotation marks omitted).

<sup>43</sup> See *id.* at 306-07.

defense be available? Market participants are constantly in flux, with service providers coming and going both permanently and temporarily for a vacation or sick leave. How will the photographer know for certain whether there is an alternative available and how much effort must he put forth in making the determination? It is also not impossible to imagine his competitors making life difficult for the objecting photographer by routinely claiming they are unavailable for jobs, adding another layer of complexity to this system.

Indeed, making one person's legal liability—that of the objecting business—turn on the actions of others—competing businesses that are “unavailable” for any “non-moral” reason seems to run counter to our notions of fair play and due process. At the least, there would be a question as to whether such a system of liability provides adequate notice to the objecting photographer about how to conform to the law. I believe there is a colorable argument that the “access defense” to a state mandate could be found unconstitutional on these grounds. That would leave the licensing option still in place, but such a system would create a more expensive, complex, and intrusive governmental role, especially since there appears to be no limit to the kinds of issues that could be made subject to this guaranteed access scheme.

The concerns over state intrusiveness and due process will be all the more unmanageable when one factors in the seemingly unlimited kinds of morally disputed issues that would likely be included in this “market access” liability scheme. For instance, I would presume this access based liability would be invoked to either impose liability or require trade unions to work on building the so-called Ground Zero mosque in Manhattan if no other workers would agree to work on the project.<sup>44</sup> Suppose that four different electrical wiring firms reject the job on moral grounds. Are all four of them liable, even if only one of them is needed to complete the job? What if the only hotel or cable company in a town refuses to provide access to pornography on moral grounds? Must Walmart stock adult sex toys if there is no other access to these morally disputed items in a particular

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<sup>44</sup> See generally Samuel Goldsmith, *We Won't Build It! Hardhats Say No Way They Will Work on WTC Mosque*, DAILY NEWS (N.Y.), Aug. 20, 2010, at 6.

community?<sup>45</sup> How about a doctor refusing to prescribe medical marijuana to those meeting statutory qualifications? Can a home renovation service reject a job that does not meet its “green” environmental standards? Must a hotel or resort agree to offer accommodations to a “swinger’s weekend” if there is no other available site? Create your own scenarios for animal rights activists, buy American campaigns, vegetarians, fair trade activists, and any of dozens of other campaigns. While statutes have in recent years added to the list of protected groups or mandates of particular disputed goods and services, none are as encompassing as Vischer’s, which potentially includes the entire universe of possible moral objections one might imagine. Rejecting the claims of any of these groups would presumably undermine the goal of government neutrality and equality of concern that seems to be at the heart of Vischer’s plan.

With an expanded list of moral objections in play and presenting the possibility of invoking governmental assistance, the number of possible conflicts increases as well. What if several businesses object to providing services, but on different moral grounds? For instance, an atheist photographer who will not work at religious ceremonies, a Sabbath observer who will not work on Saturdays, another objects because the couple is gay, a fourth refuses jobs where alcohol is present, and a fifth objects because she refuses to attend wedding receptions where meat is served. Are all five of these photographers legally liable to the customer? If the government is to remain morally neutral, and perhaps avoid equal protection concerns, then presumably it is not permissible to favor some moral objections over others, meaning that all five must be treated the same. What about a sixth photographer who refuses the job but will not say why? Furthermore, such competing “moral communities,” each with its own criteria for objecting to acceptance of a job, increase the uncertainties with regard to legal liability, and, therefore, the pressure on an objector to abandon his or her principals.

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<sup>45</sup> Compare *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 747 (5th Cir. 2008) (holding that a state ban on the promotion of sex toys to adults violates the Fourteenth Amendment), with *Williams v. Morgan*, 478 F.3d 1316, 1323 (11th Cir. 2007) (upholding a ban on the sale of sex toys to adults against a Fourteenth Amendment challenge).

These factors would seem to combine to create a particular challenge to those businesses located in smaller, rural, and more homogenous areas of the country. It is likely that there are many more competing businesses and service providers to choose from in larger metropolitan areas, with the result that a few morally objecting providers may well hope that a broader pool of providers will shield their moral choices from liability. Businesses located in smaller communities with fewer competitors and more local agreement on moral issues will face the highest risk of being required to violate their deeply held moral convictions. It is fair to assume that many businesses in such rural communities stay on because of their ties to the community, rather than because of favorable market conditions. The pressure on those with the strongest convictions and lowest economic margins, therefore, will be to either move to more populated areas or simply drop out of the market entirely, thus risking the possibility that even fewer providers will remain to offer goods and services to these rural communities. In their place will come those without the distinctive moral commitments that Vischer's proposal sought to protect.

This urban/rural split also seems to undermine the idea that the hoped-for "moral marketplace" is one in which everyone is equally free to seek to establish institutions that reflect and support one's conscientious beliefs and persuade others to your point of view. In areas where a community is relatively cohesive, a few people will be empowered to bring the power of the state to bear to require provision of morally contested goods and services, with the objectors being either forced to change or driven to the cities. There may be some irony here. Typically, those who challenged the prevailing morality of a small cohesive community were drawn to the city to find the freedom to live out their "subversive" moral identity. Under Vischer's proposal, the morally-objecting businesses are now the subversives, causing market failures that require state intervention and facing the prospect of moving to the big city in order to continue to conduct their businesses in accordance with their moral convictions. The migration to the cities by conscientious objectors would be the result of direct state coercion, a factor that will not foster Vischer's goal of peaceful co-existence among the contending sides.

Relatedly, Vischer's access model seems to introduce a perverse incentive to avoid persuading others to join in one's "moral community" based on disputed moral claims. Vischer urges both sides in the "culture war" to find "their sustenance . . . from targeting the hearts and minds of their neighbors, joining together in common cause,"<sup>46</sup> rather than by trying to win blanket protections from the state. But this advice is only helpful to those who want access to morally disputed goods and services and not to those who object to providing them. Under Vischer's system, a provider's freedom to morally object in the marketplace is dependent on the existence of others who disagree with those views and who are therefore willing to provide the disputed goods or services. Being too persuasive in encouraging others to adopt your moral views will thereby increase the chances that you will be subject to legal liability for adhering to those views. Therefore, a pharmacy that refuses to dispense the morning-after pill will have every reason to avoid encouraging other pharmacies to act accordingly. Such self-censorship defeats the goal of encouraging a determined, open-minded, and free discussion about competing moral visions of the good.

Finally, given the virtually unbounded set of possible morally-based market conflicts over goods or services that could be considered essential, I find it puzzling that his book makes only the slightest mention of how his system would apply to abortion and other conflicts involving doctors and hospitals, a subject Vischer covers in less than two full pages. Almost every state has some version of a health care right of conscience statute, setting forth legal protection for health care workers and institutions with objections to providing morally controversial services, particularly abortion. At the federal level, the Church Amendment protects both health care institutions and individual health care workers from discrimination for either providing abortions or refusing to provide abortions.<sup>47</sup> Vischer's book does not mention these statutes, nor does he explain how his system would resolve the growing list of potential bioethical conflicts.

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<sup>46</sup> VISCHER, *supra* note 12, at 164.

<sup>47</sup> See 42 U.S.C. § 300a-7 (2006).

Vischer does suggest that a broader market analysis may be important to such questions. For instance, he suggests that forcing Catholic hospitals to do abortions might actually worsen the health care market in a particular locality if these hospitals are forced to close and no other hospitals are willing to take their place.<sup>48</sup> Therefore, it may not be wise for the state to enforce a market access model in such cases. He does not explain what should happen if another hospital willing to provide the services offers to move into an area, but it would seem from his premises that the state should then go ahead and fulfill its market access function by mandating access to the service. Given the advantages of economies of scale and enlarging existing networks, it is not impossible to imagine that some healthcare corporations would be happy to take on the predatory role of eliminating its competitors by hopping onto the “market access” bandwagon.

Nor does Vischer discuss how to properly apply his model to individual health care workers, such as doctors and nurses who work in health care institutions that do provide abortions and other contested services. Under current federal law, no health care institution can discriminate in employment, privileges, or promotion against a doctor who refuses to provide abortions nor against a doctor who does perform abortions.<sup>49</sup> This statute runs counter to Vischer’s argument that institutions must be free to determine their own institutional moral identity and should not be bound by law to accommodate employees with moral objections undermining the institution’s moral identity.<sup>50</sup>

While it is possible that federal law mandating some kinds of religious accommodations to workers may offer some assistance to such health care workers, this is a very thin reed when compared to current federal law. Under both Title VII and the recently proposed Workplace Religious Freedom Act of 2010 (the “WRFA”), an employer need not accommodate the worker if doing so will present an “undue hardship” on the institution.<sup>51</sup> In practice, an undue hardship is usually economic in nature.

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<sup>48</sup> See VISCHER, *supra* note 12, at 177.

<sup>49</sup> See 42 U.S.C. § 300a-7.

<sup>50</sup> See, e.g., VISCHER, *supra* note 12, at chs. 6–7 (discussing the need to protect a corporation’s right to define its own moral identity with regard to disputed moral questions). Generally, the state should not intervene to protect employees who disagree with these corporate judgments. See *id.* at 156, 201.

<sup>51</sup> See 42 U.S.C. § 2000e(j); S. 4046, 111th Cong. § 2 (2010).



It is likely that a pro-choice hospital could refuse to accommodate a pro-life doctor under these statutes. Given that under Vischer's approach a potential patient can apparently predicate legal liability on the institution for refusing the service in some circumstances, it would seem likely that many hospitals could rather easily demonstrate that accommodating pro-life doctors and nurses creates the "undue hardship" of the threat of legal liability. This economic burden would mean the institution need not accommodate pro-life staff, particularly in rural areas where staff shortages mean that others willing to do the procedure are not available.

Notably, under Vischer's scheme, although pro-life doctors would thus face permissible discrimination, it is arguable that a pro-choice doctor would merit an accommodation that would allow him to violate a pro-life hospital's policy against abortions. If a doctor's religious beliefs require him to provide abortions in some cases, a pro-life hospital would have to demonstrate that employing him creates an "undue hardship"—on the hospital. This pro-choice doctor is not creating the risk of liability to the hospital that a pro-life doctor's refusal to participate in abortion might, and thus the pro-life hospital could well be required to accommodate the pro-choice doctor's beliefs.

Nor would Title VII or the WRFA offer any assistance to a doctor with her own private practice who has moral objections to providing certain services if those services are otherwise "unavailable" in the community. This is obvious from Vischer's discussion of the case of Guadalupe Benitez, an unmarried woman who was denied fertility assistance by a clinic with moral limits on those it would accept as patients.

If there is no viable marketplace for an essential good or service, state intervention is appropriate. Consider the recent lawsuit filed by Guadalupe Benitez against a fertility clinic near San Diego and two of its physicians for refusing to provide intrauterine fertilization because she was unmarried (according to the doctors) or because she was a lesbian (according to Benitez). Ideally, the resolution of this conflict would not hinge on elevating freedom or equality over the other, but on whether Benitez could obtain those services elsewhere without incurring substantial hardship. (In that particular case, although there are many reproductive specialists in San Diego who would have

provided their services to Benitez, she alleges that the defendant clinic was the only provider covered under her employer's health insurance policy.)<sup>52</sup>

There is nothing in Vischer's book to suggest that the proper handling of this case would be different if the doctors had been obstetricians and Benitez had requested an abortion. The potential for moral conflicts in this area is endless. Say that a clinic performing abortions refused to do sex-selection abortions, but will do all others.<sup>53</sup> Or that a fertility clinic refuses to assist a deaf lesbian couple's efforts to conceive only a deaf child.<sup>54</sup> Is it appropriate for the government to intervene and require that these services be made available? Nor does Vischer answer his implicit question as to whether the service is "unavailable" by reason of insurance coverage limitations, but it would appear that he is suggesting that this is a relevant factor. This would mean that pro-life physicians and institutions face another order of magnitude of uncertainty with regard to potential liability, further encouraging health care workers to abandon either their scruples or their jobs even in larger markets like San Diego.

Because of the strong commitments on both sides of the abortion issue, it seems likely that there would be a concerted effort to bring "access challenges" wherever possible in order to change the balance of power regarding this issue. The uncertainty over legal duties would then likely trickle down into medical education, with added pressure for doctors to be trained in all morally contested but lawful services, as they might one day be required to provide those services.

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<sup>52</sup> VISCHER, *supra* note 12, at 306–07 (citations omitted).

<sup>53</sup> See Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, in 105 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 5681, 5681–82 (2008), available at [www.pnas.org/content/105/5681.full](http://www.pnas.org/content/105/5681.full) (presenting evidence of sex selective abortions of female fetuses in the United States, particularly involving parents from India, South Korea, and China).

<sup>54</sup> See Carina Dennis, *Deaf by Design*, 431 NATURE 894, 895 (2004) (discussing the successful efforts one lesbian couple undertook to have a deaf child by finding a sperm donor with a genetic predisposition to passing on the trait). This article also reports on surveys showing preferences among the deaf for having deaf children, including surveys suggesting some couples would consider aborting a non-deaf fetus. See *id.* Finally, it reports that a third of American doctors would agree to perform pre-implantation genetic diagnosis to assist such a couple in choosing a deaf child. See *id.* at 896.

Although he claims otherwise, Vischer's policy approach pushes most strongly only in one direction, against those with moral scruples to the provision of the widest possible set of legally permissible goods and services. These providers all face the possibility of state coercion under his plan, although the requirement of various factual judgments by the state would mean that the pressure will be felt in only a piecemeal fashion at the outset. Notably, this approach also seems to ignore the conscience beliefs of consumers on the "receiving end" of goods and services who seek to retain services of those who are committed to living out of an intentionally focused moral point of views in the moral marketplace. This issue is probably more pronounced in the health care area, where there are stark disagreements about the morality of various conceptions of "health."

Take a pro-life couple who believe it is their duty to find a hospital and doctor who share their view that abortion cannot properly be included in a sound definition of health care and that they have a duty to avoid cooperation in such practices by boycotting those who disagree. They might believe, for instance, that patronizing a pro-choice doctor or hospital encourages the practice of abortion by creating the misimpression that a pro-life couple endorses the doctor's practices. They also might be less likely to trust the advice of a doctor whose values diverge so strongly from their own. Therefore, they seek out a pro-life medical practice.

Now suppose the hospital has an additional licensing requirement to demonstrate access to abortion services or that the medical practice faces a suit for refusing to provide an abortion. Assuming that the state agrees that abortion is an "essential" service, at least as important as cab services from the airport or wedding photography services, the state will have to act to assure abortion services in the community. Thus, it is likely that many hospitals and medical practices that refuse to do abortions will face the loss of a license or face liability for failing to provide abortion services to those seeking them.

Not only are the hospital, doctors, and staff potentially burdened by such a mandate, but so is the pro-life couple who seeks to participate in a "moral community" committed to respecting the life of the unborn. Previously, they had access to a medical service in line with their moral beliefs, but after the

state mandate, they are required to participate in a “moral community” with values they abhor. The market access approach creates an obvious hardship to the pro-life medical community who will be forced into an insoluble moral dilemma.

But it will also mean that the pro-life couple is now the party that must travel to the cities with enough moral diversity to permit a pro-life hospital or medical practice to exist, even if—or rather, especially if—the overwhelming majority of their rural community wants to support a pro-life medical community.

Now let us say this pro-life couple lives in a community where the only hospital providing delivery services also provides abortions. I take it the couple would not have a parallel “lack of access” claim requiring state intervention to assure access to a pro-life obstetrics and gynaecology service? Or would they? If not, then the pro-choice advocates would seemingly have a legal mechanism for bringing the coercive power of the state to bear to seek to end a pro-life hospital’s policy, while the pro-life community would have no grounds for objecting to an abortion-providing service.

I would predict that the outcome of this imbalance would be a steady attrition of pro-life health care institutions outside of cities with a morally diverse health care community. Small towns and rural areas that cannot support more than one health care institution would likely face state coercion to provide the full range of morally contested practices, thus hobbling the development of those mediating institutions that permit people to live out their shared moral values, the central goal of Vischer’s policy proposal. If one factors in the insurance limitations that appear to be a factor in whether a service is “unavailable,” then even urban hospitals may face pressure to abandon pro-life policies.

The “culture war” has been raging for quite some time and shows no sign of abating. I can appreciate the impulse that has motivated Vischer to come up with a viable compromise that would redirect the energies of the two sides to a more constructive path and away from state-enforced winner-take-all approaches. However, I fear his policy proposal would simply create a unidirectional pressure that would eventually force out of the market many providers whose moral convictions do not permit them to offer certain morally contested goods and services. Given the more diffuse nature of Vischer’s approach,

focusing on administrative mechanisms and discrete factual inquiries, it will be more difficult to rally political support to those who are being coerced to violate their convictions or forced out of business.

Vischer's plan would also create a big incentive for groups to harness the power of the state as market facilitator, depending on how one defines the relevant "market failures" that trigger this function. If the state is required to enter into all of the moral disputes currently being waged in the marketplace, this proposal could well result in a net increase in the use of state coercive power, rather than the hoped for decrease. Finally, with respect to the abortion controversy, Vischer's proposal would replace existing strong conscience protections for health care workers and institutions with a tenuous shield entirely dependent on the availability of abortion providers in the community. Rather than resulting in an even-handed *détente*, I fear that the state as market facilitator would simply facilitate the slow motion disintegration of those whose moral convictions require limitations on the kinds of goods and services they will offer. In their place will come a set of institutions reflecting the lowest common denominator, with no distinctive moral convictions that might rock the boat.

Perhaps such an outcome is conducive to some people's understanding of the common good, but it does not offer much hope to those who seek to integrate their moral convictions into their professional lives.